

## **TITLE 76**

### **LAND RESOURCES AND USE**

#### **CHAPTER 5**

#### **FLOOD PLAIN AND FLOODWAY MANAGEMENT**

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### **Chapter Cross-References**

- Water rights, Art. IX, sec. 3, Mont. Const.
- Flood control by water and sewer districts, 7-13-2218.
- Flood Control Act of 1954 -- distribution of revenue to counties, 17-3-231, 17-3-232.
- Easements relating to flooding, 70-17-101.
- Application of The Natural Streambed and Land Preservation Act of 1975, 75-7-105.
- Renewable resource development program -- flood control, 85-1-602.
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## **Part 1**

### **General Provisions**

- 76-5-101. Findings.** The people of the state of Montana find that:
- (1) recurrent flooding of a portion of the state's land resources causes loss of life, damage to property, disruption of commerce and governmental services, and unsanitary conditions; all of which are detrimental to the health, safety, welfare, and

property of the occupants of flooded lands and the people of this state; and

(2) the public interest necessitates management and regulation of flood-prone lands and waters in a manner consistent with sound land and water use management practices which will prevent and alleviate flooding threats to life and health and reduce private and public economic losses.

**History:** En. Sec. 1, Ch. 393, L. 1971; R.C.M. 1947, 89-3501.

**76-5-102. Policy and purposes.** (1) The policy and purposes of parts 1 through 4 of this chapter are to:

(a) guide development of the floodway areas of this state consistent with the enumerated findings;

(b) recognize the right and need of watercourses to periodically carry more than the normal flow of water;

(c) provide state coordination and technical assistance to local units in management of floodway areas;

(d) coordinate federal, state, and local management activities for floodway areas;

(e) encourage local governmental units to manage flood-prone lands, including the adoption, enforcement, and administration of land use regulations; and

(f) provide the department of natural resources and conservation with authority necessary to carry out a comprehensive floodway management program for the state.

(2) Specifically, it is the purpose of parts 1 through 4 to:

(a) restrict or prohibit uses that are dangerous to health or safety of property in times of flood or that cause increased flood heights or velocities;

(b) require that uses vulnerable to floods, including public facilities that serve the uses, be provided with flood protection at the time of initial construction;

(c) develop and provide information to identify lands that are unsuited for certain development purposes because of flood hazard;

(d) distinguish between the land use regulations applied to the designated floodway and those applied to that portion of the designated flood plain not contained within the designated floodway;

(e) apply more restrictive land use regulations within the designated floodway;

(f) ensure that regulations and minimum standards adopted under parts 1 through 4, insofar as possible, balance the greatest public good with the least private injury.

**History:** En. Sec. 2, Ch. 393, L. 1971; amd. Sec. 194, Ch. 253, L. 1974; amd. Sec. 1, Ch. 271, L. 1974; R.C.M. 1947, 89-3502; amd. Sec. 241, Ch. 418, L. 1995.

**76-5-103. Definitions.** As used in parts 1 through 4 of this chapter, unless the context otherwise requires, the following definitions apply:

(1) "Artificial obstruction" means any obstruction that is not a natural obstruction and includes any dam, wall, riprap, embankment, levee, dike, pile, abutment, projection, revetment, excavation, channel rectification, bridge, conduit, culvert, building, refuse, automobile body, fill, or other analogous structure or matter in, along, across, or projecting into any flood plain or floodway that may impede, retard, or change the

direction of the flow of water, either in itself or by catching or collecting debris carried by the water, or that is placed where the natural flow of the water would carry the same downstream to the damage or detriment of either life or property.

(2) "Channel" means the geographical area within either the natural or artificial banks of a watercourse or drainway.

(3) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

(4) "Designated flood plain" means a flood plain whose limits have been designated and established by order of the department.

(5) "Designated floodway" means a floodway whose limits have been designated and established by order of the department.

(6) "Drainway" means any depression 2 feet or more below the surrounding land serving to give direction to a current of water less than 9 months of the year and having a bed and well-defined banks.

(7) "Establish" means construct, place, insert, or excavate.

(8) "Flood" means the water of any watercourse or drainway that is above the bank or outside the channel and banks of the watercourse or drainway.

(9) "Flood of 100-year frequency" means a flood magnitude expected to recur on the average of once every 100 years or a flood magnitude that has a 1% chance of occurring in any given year.

(10) "Flood plain" means the area adjoining the watercourse or drainway that would be covered by the floodwater of a flood of 100-year frequency, except for sheetflood areas that receive less than 1 foot of water per occurrence and are considered "zone B" by the federal emergency management agency.

(11) "Floodway" means the channel of a watercourse or drainway and those portions of the flood plain adjoining the channel that are reasonably required to carry and discharge the floodwater of any watercourse or drainway.

(12) "Natural obstruction" means any rock, tree, gravel, or analogous natural matter that is an obstruction and has been located within the flood plain or floodway by a nonhuman cause.

(13) "Owner" means any person who has dominion over, control of, or title to an obstruction.

(14) "Political subdivision" means any incorporated city or town or any county organized and having authority to adopt and enforce land use regulations.

(15) "Responsible political subdivision" means a political subdivision that has enacted land use regulations in accordance with parts 1 through 4.

(16) (a) "Watercourse" means any depression 2 feet or more below the surrounding land serving to give direction to a current of water at least 9 months of the year and having a bed and well-defined banks.

(b) Upon order of the department, the term also includes any particular depression that would not otherwise be within the definition of watercourse.

**History:** En. Sec. 3, Ch. 393, L. 1971; amd. Sec. 1, Ch. 294, L. 1973; amd. Sec. 195, Ch. 253, L. 1974; amd. Sec. 2, Ch. 271, L. 1974; R.C.M. 1947, 89-3503(part); amd. Sec. 1, Ch. 428, L. 1981; amd. Sec. 242, Ch. 418, L. 1995.

**76-5-104. Presumption that depression is watercourse.** In the event of doubt

as to whether a depression is a watercourse or drainway, it shall be presumed to be a watercourse.

**History:** En. Sec. 3, Ch. 393, L. 1971; amd. Sec. 1, Ch. 294, L. 1973; amd. Sec. 195, Ch. 253, L. 1974; amd. Sec. 2, Ch. 271, L. 1974; R.C.M. 1947, 89-3503(part).

**76-5-105. Authority to enter and investigate lands or waters.** (1) The department or the responsible political subdivision may make reasonable entry upon any lands and waters in the state for the purpose of making an investigation, survey, removal, or repair contemplated by parts 1 through 4 of this chapter. Unless written consent is obtained, however, the department or the responsible political subdivision shall provide written notice of its entry by personal delivery to the owner, owner's agent, lessee, or lessee's agent whose lands will be entered. If none of these persons can be found, the department or the responsible political subdivision shall affix a copy of the notice to one or more conspicuous places on the property.

(2) An investigation of a natural or artificial obstruction or nonconforming use shall be made by the department or the responsible political subdivision either on its own initiative, on the written request of three titleholders of land abutting the watercourse or drainway involved, or on the written request of a political subdivision. Upon the request of an owner, owner's agent, lessee, or lessee's agent whose lands will be entered to undertake the investigation, the department or the responsible political subdivision shall release the names and addresses of the persons or political subdivision requesting the investigation.

**History:** En. Sec. 9, Ch. 393, L. 1971; amd. Sec. 201, Ch. 253, L. 1974; amd. Sec. 8, Ch. 271, L. 1974; R.C.M. 1947, 89-3509; amd. Sec. 1, Ch. 382, L. 1985.

**76-5-106. Exemption for small drainage area.** Parts 1 through 4 of this chapter do not extend to any obstruction in the flood plain or floodway of a watercourse or drainway where the drainage area above the watercourse or drainway, either within or outside the state, is less than 25 square miles in extent unless a particular watercourse or drainway is expressly declared to be within the coverage of parts 1 through 4 by order of the department.

**History:** En. Sec. 10, Ch. 393, L. 1971; amd. Sec. 9, Ch. 271, L. 1974; R.C.M. 1947, 89-3510; amd. Sec. 243, Ch. 418, L. 1995.

**76-5-107. Federal supremacy.** Parts 1 through 4 do not interfere with the right of the United States to regulate interstate commerce or the navigable waters of the United States.

**History:** En. Sec. 14, Ch. 393, L. 1971; amd. Sec. 204, Ch. 253, L. 1974; amd. Sec. 11, Ch. 271, L. 1974; amd. Sec. 4, Ch. 73, L. 1977; R.C.M. 1947, 89-3514(part).

**76-5-108. Permit construed as added requirement.** The granting of a permit under parts 1 through 4 of this chapter does not affect any other type of approval required by any other statute or ordinance of the state, of any political subdivision, or of the United States but is an added requirement.

History: En. Sec. 14, Ch. 393, L. 1971; amd. Sec. 204, Ch. 253, L. 1974; amd. Sec. 11, Ch. 271, L. 1974; amd. Sec. 4, Ch. 73, L. 1977; R.C.M. 1947, 89-3514(part).

**76-5-109. Other legal remedies preserved -- immunity.** (1) The grant or denial of a permit does not have an effect on a remedy of a person at law or in equity.

(2) When it is shown that there is a wrongful failure to comply with parts 1 through 4 of this chapter, there is a rebuttable presumption that the obstruction was the proximate cause of the flooding of the land of a person bringing suit.

(3) The use of any one of the remedies or powers given to the department in parts 1 through 4 is not a bar to the exercise of any other remedy or power given by parts 1 through 4.

(4) An action for damages sustained because of injury caused by an obstruction for which a permit has been granted under parts 1 through 4 may not be brought against the state or the department.

History: (1), (2), (4)En. Sec. 14, Ch. 393, L. 1971; amd. Sec. 204, Ch. 253, L. 1974; amd. Sec. 11, Ch. 271, L. 1974; amd. Sec. 4, Ch. 73, L. 1977; Sec. 89-3514, R.C.M. 1947; (3)En. Sec. 15, Ch. 393, L. 1971; amd. Sec. 205, Ch. 253, L. 1974; Sec. 89-3515, R.C.M. 1947; R.C.M. 1947, 89-3514(part), 89-3515; amd. Sec. 244, Ch. 418, L. 1995.

**76-5-110. Penalties for violation.** Any person who violates 76-5-401 through 76-5-404 shall be guilty of a misdemeanor and shall upon conviction thereof be fined not more than \$100 or be imprisoned in the county jail for not more than 10 days or be both so fined and imprisoned. Each day's continuance of a violation shall be deemed a separate and distinct offense.

History: En. Sec. 13, Ch. 393, L. 1971; R.C.M. 1947, 89-3513.

## **Part 2**

### **Role of State Agencies**

**76-5-201. Program for delineation of flood plains and floodways.** (1) The department shall initiate a comprehensive program for the delineation of designated flood plains and designated floodways for each watercourse and drainway in the state. It shall make a study relating to the acquiring of flood data and may enter into arrangements with the United States geological survey, the United States army corps of engineers, or any other state or federal agency for the acquisition of data.

(2) Before the department establishes by order a designated flood plain or a designated floodway, the department shall consult with the affected political subdivisions. Consultation must include but is not limited to the following:

(a) specifically requesting that the political subdivisions submit pertinent data concerning flood hazards, including flooding experiences, plans to avoid potential hazards, estimates of economic impacts of flooding on the community, both historical and prospective, and other data that is considered appropriate;

(b) notifying local officials, including members of the county commission, city council, and planning board, of the progress of surveys, studies, and investigations and of proposed findings, along with information concerning data and methods employed in

reaching conclusions; and

(c) encouraging local dissemination of information concerning surveys, studies, and investigations so that interested persons will have an opportunity to bring relevant data to the attention of the department.

**History:** En. Sec. 4, Ch. 393, L. 1971; amd. Sec. 2, Ch. 294, L. 1973; amd. Sec. 196, Ch. 253, L. 1974; amd. Sec. 3, Ch. 271, L. 1974; amd. Sec. 1, Ch. 262, L. 1977; R.C.M. 1947, 89-3504(1); amd. Sec. 245, Ch. 418, L. 1995.

**76-5-202. Designation of flood plains and floodways.** (1) When sufficient data has been acquired by the department, the department shall establish, by order after a public hearing, the designated flood plain within which a political subdivision may establish land use regulation.

(2) When sufficient data has been acquired, the department shall establish, by order after a public hearing, the designated floodway within which a political subdivision may establish land use regulation.

(3) These designations must be based upon reasonable hydrological certainty. Designations made according to a flood hazard boundary map prepared by the federal emergency management agency have a rebuttable presumption of reasonable hydrological certainty.

(4) The department shall record all designated flood plains or designated floodways in the office of the county clerk and recorder of each county in which those flood plains or floodways are found.

**History:** En. Sec. 4, Ch. 393, L. 1971; amd. Sec. 2, Ch. 294, L. 1973; amd. Sec. 196, Ch. 253, L. 1974; amd. Sec. 3, Ch. 271, L. 1974; amd. Sec. 1, Ch. 262, L. 1977; R.C.M. 1947, 89-3504(part); amd. Sec. 1, Ch. 160, L. 1987; amd. Sec. 246, Ch. 418, L. 1995.

**76-5-203. Alteration of flood plains or floodways.** The department may alter the flood plains or floodways at any later time, by order after a public hearing, if a reevaluation of the then available flood data warrants it.

**History:** En. Sec. 4, Ch. 393, L. 1971; amd. Sec. 2, Ch. 294, L. 1973; amd. Sec. 196, Ch. 253, L. 1974; amd. Sec. 3, Ch. 271, L. 1974; amd. Sec. 1, Ch. 262, L. 1977; R.C.M. 1947, 89-3504(part); amd. Sec. 247, Ch. 418, L. 1995.

**76-5-204. What constitutes notice.** Notice of a hearing or order of the department establishing or altering the flood plains or floodways must be given by publishing the notice once each week for 3 consecutive weeks in a legal newspaper published or of general circulation in the area involved. The last publication of the notice may not be less than 10 days prior to the date set for the hearing or the effective date of the order.

**History:** En. Sec. 4, Ch. 393, L. 1971; amd. Sec. 2, Ch. 294, L. 1973; amd. Sec. 196, Ch. 253, L. 1974; amd. Sec. 3, Ch. 271, L. 1974; amd. Sec. 1, Ch. 262, L. 1977; R.C.M. 1947, 89-3504(part); amd. Sec. 248, Ch. 418, L. 1995.

**76-5-205. Furnishing of material to local governments.** (1) When the designated flood plain or the designated floodway has been established, the department

shall furnish this data to officials of the political subdivision having jurisdiction over those areas, together with a map outlining the areas involved, a copy of parts 1 through 4 of this chapter, adopted rules of the department, and suggested minimum standards adopted by the department.

(2) These standards and rules must reflect gradations in flood hazard based on criteria as outlined in 76-5-406. In adopting these standards and rules, the department shall consider local input from the affected political subdivisions.

**History:** En. Sec. 4, Ch. 393, L. 1971; amd. Sec. 2, Ch. 294, L. 1973; amd. Sec. 196, Ch. 253, L. 1974; amd. Sec. 3, Ch. 271, L. 1974; amd. Sec. 1, Ch. 262, L. 1977; R.C.M. 1947, 89-3504(part); amd. Sec. 249, Ch. 418, L. 1995.

**76-5-206. Powers and duties of department relative to obstructions. (1)**

When an obstruction to a designated floodway established under 76-5-202 through 76-5-205 has been created by fallen trees, silt, debris, wreckage, unanchored automobile bodies, and like matter, the department may, in its discretion, remove the obstruction, in which case the cost of removal must be borne by the department.

(2) When, after investigation, notice, and hearing, an order has been issued by the department to the owner of an obstruction not exempt under 76-5-401 through 76-5-404 for its removal or repair and the order is not complied with within a reasonable time as may be prescribed or if the owner cannot be found or determined, the department may make the removal or repairs or cause the removal or repairs to be made. The cost of the removal or repairs must be borne by the owner and are recoverable in the same manner as debts are recoverable by law.

**History:** En. Sec. 8, Ch. 393, L. 1971; amd. Sec. 5, Ch. 294, L. 1973; amd. Sec. 200, Ch. 253, L. 1974; amd. Sec. 7, Ch. 271, L. 1974; R.C.M. 1947, 89-3508; amd. Sec. 250, Ch. 418, L. 1995.

**76-5-207. Floodway obstruction removal fund.** The state treasurer shall establish the floodway obstruction removal fund and credit to the fund for the removal of obstructions as provided in 76-5-206(1) such money specifically appropriated by the legislature. The department may allocate money from the floodway obstruction removal fund for purposes provided in 76-5-206(1).

**History:** En. Sec. 12, Ch. 393, L. 1971; amd. Sec. 203, Ch. 253, L. 1974; R.C.M. 1947, 89-3512.

**76-5-208. Orders and rules. (1)** The department may adopt orders and rules that are necessary to implement parts 1 through 4 of this chapter. All orders and rules must be on file at the offices of the department and in the office of the county clerk and recorder of each county affected by the order or rule.

(2) If an order is issued to the owner of an artificial obstruction or nonconforming use not exempt under 76-5-401 through 76-5-404 for its removal or repair, the order may not become effective less than 10 days after a hearing is held relating to the order.

(3) In addition to any requirement imposed by 76-5-202 through 76-5-205, when an order is issued that affects with particularity the land adjacent to a watercourse or drainway, notice of the contents of the order and of any required hearing must be mailed to the titleholder of the land not less than 10 days before the effective date of the order or, if there is a required hearing, to the titleholder of the land and to the owner of



the artificial obstruction or nonconforming use not less than 10 days before the date of the hearing. However, the notice need not be given to the owner of the artificial obstruction or nonconforming use for an order issued pursuant to 76-5-206(2) if the owner cannot be found or determined.

**History:** En. Sec. 11, Ch. 393, L. 1971; amd. Sec. 202, Ch. 253, L. 1974; amd. Sec. 10, Ch. 271, L. 1974; R.C.M. 1947, 89-3511(part); amd. Sec. 251, Ch. 418, L. 1995.

### **Cross-References**

Adoption and publication of rules under Montana Administrative Procedure Act, Title 2, ch. 4, part 3.

**76-5-209. Appeal from order.** (1) A person aggrieved by any order of the department issued under parts 1 through 4 of this chapter may appeal from the order to a court of competent jurisdiction within 30 days after the order's effective date. Service of notice of the appeal must be made upon the department.

(2) If an appeal is taken, enforcement of the order is stayed pending the outcome of the appeal.

**History:** En. Sec. 11, Ch. 393, L. 1971; amd. Sec. 202, Ch. 253, L. 1974; amd. Sec. 10, Ch. 271, L. 1974; R.C.M. 1947, 89-3511(part); amd. Sec. 252, Ch. 418, L. 1995.

### **Cross-References**

Contested cases under Montana Administrative Procedure Act, Title 2, ch. 4, part 6.

## **Part 3 Role of Local Government**

### **Part Cross-References**

Flood Control Act of 1954 -- distribution of revenue to counties, 17-3-231, 17-3-232.

**76-5-301. Land use regulations.** (1) Upon transmittal of the flood plain information to officials of a political subdivision, the political subdivision has 6 months from the date of transmittal to adopt land use regulations that meet or exceed the minimum standards of the department. The regulations may include, for the purposes of flood plain management only, flood plain management regulations within sheetflood areas as determined by the federal emergency management agency.

(2) If within the 6-month period the political subdivision has failed to adopt the land use regulations, the department shall enforce the minimum standards within the designated flood plain or the designated floodway as established by the department under 76-5-202 through 76-5-205, and an artificial obstruction or nonconforming use may not be established by any person within the designated flood plain or the designated floodway unless specifically authorized by the department.

(3) A political subdivision that has failed to adopt land use regulations that meet or exceed the minimum standards of the department within the 6-month period may subsequently adopt regulations, and if approved by the department, the regulations are

effective within the designated flood plain or floodway and must be administered and enforced by the political subdivision.

(4) When necessary for compliance with federal flood insurance requirements, the department may shorten the 6-month period upon notification to the political subdivision and publication of a notice of the revised period in a newspaper of general circulation in the affected area once a week for 3 consecutive weeks.

**History:** En. Sec. 4, Ch. 393, L. 1971; amd. Sec. 2, Ch. 294, L. 1973; amd. Sec. 196, Ch. 253, L. 1974; amd. Sec. 3, Ch. 271, L. 1974; amd. Sec. 1, Ch. 262, L. 1977; R.C.M. 1947, 89-3504(3) thru (5); amd. Sec. 1, Ch. 74, L. 1983; amd. Sec. 253, Ch. 418, L. 1995.

**76-5-302. Substitution of local control for state permit system.** (1) If a political subdivision enacts, in harmony with the purposes of parts 1 through 4 of this chapter, permit issuance ordinances, regulations, or resolutions and land use ordinances, regulations, or resolutions that meet or exceed the minimum standards of the department and if the administrative and enforcement procedures established for those ordinances, regulations, or resolutions are found acceptable by the department, a permit from the department is not required.

(2) However, if the department determines that there is a failure by a political subdivision to comply with the intent, purposes, and provisions of parts 1 through 4 and the minimum standards adopted under parts 1 through 4, the powers of the political subdivision may be suspended after hearing and the minimum standards adopted by the department must be enforced by the department until the department determines that the political subdivision will comply.

**History:** En. Sec. 14, Ch. 393, L. 1971; amd. Sec. 204, Ch. 253, L. 1974; amd. Sec. 11, Ch. 271, L. 1974; amd. Sec. 4, Ch. 73, L. 1977; R.C.M. 1947, 89-3514(part); amd. Sec. 254, Ch. 418, L. 1995.

#### **Part 4**

### **Use of Flood Plains and Floodways**

#### **Part Cross-References**

Easements relating to flooding, 70-17-101.

**76-5-401. Permissible open-space uses.** The following open-space uses are permitted within the designated floodway to the extent that they are not prohibited by any other ordinance or statute and provided they do not require structures other than portable structures, fill, or permanent storage of materials or equipment:

- (1) agricultural uses;
- (2) industrial-commercial uses such as loading areas, parking areas, or emergency landing strips;
- (3) private and public recreational uses such as golf courses, tennis courts, driving ranges, archery ranges, picnic grounds, boat launching ramps, swimming areas, parks, wildlife management and natural areas, alternative livestock ranches, fish hatcheries, shooting preserves, target ranges, trap and skeet ranges, hunting and fishing areas, or hiking and horseback riding trails;
- (4) forestry, including processing of forest products with portable equipment;
- (5) residential uses such as lawns, gardens, parking areas, and play areas;
- (6) excavations subject to the issuance of a permit under 76-5-405 and 76-5-

406.

**History:** En. Sec. 6, Ch. 393, L. 1971; amd. Sec. 4, Ch. 294, L. 1973; amd. Sec. 198, Ch. 253, L. 1974; amd. Sec. 5, Ch. 271, L. 1974; R.C.M. 1947, 89-3506(2); amd. Sec. 68, Ch. 7, L. 2001.

### **Cross-References**

Recreational use of flood control channel prohibited, 23-2-301, 23-2-302.

**76-5-402. Permissible uses within flood plain but outside floodway.** Permits must be granted for the following uses within that portion of the flood plain not contained within the designated floodway to the extent that they are not prohibited by any other ordinance, regulation, or statute:

- (1) any use permitted in the designated floodway;
- (2) structures, including but not limited to residential, commercial, and industrial structures, provided that:
  - (a) the structures meet the minimum standards adopted by the department;
  - (b) residential structures are constructed on fill such that the lowest floor elevation (including basements) is 2 feet above the 100-year flood elevation;
  - (c) commercial and industrial structures are either constructed on fill as specified in subsection (2)(b) or are adequately floodproofed up to an elevation no lower than 2 feet above the 100-year flood elevation. The floodproofing must be in accordance with the minimum standards adopted by the department.

**History:** En. Sec. 6, Ch. 393, L. 1971; amd. Sec. 4, Ch. 294, L. 1973; amd. Sec. 198, Ch. 253, L. 1974; amd. Sec. 5, Ch. 271, L. 1974; R.C.M. 1947, 89-3506(3); amd. Sec. 255, Ch. 418, L. 1995.

**76-5-403. Prohibited uses within floodway.** The following nonconforming uses shall be prohibited within the designated floodway:

- (1) a building for living purposes or place of assembly or permanent use by human beings;
- (2) a structure or excavation that will cause water to be diverted from the established floodway, cause erosion, obstruct the natural flow of water, or reduce the carrying capacity of the floodway;
- (3) the construction or permanent storage of an object subject to flotation or movement during flood level periods.

**History:** En. Sec. 6, Ch. 393, L. 1971; amd. Sec. 4, Ch. 294, L. 1973; amd. Sec. 198, Ch. 253, L. 1974; amd. Sec. 5, Ch. 271, L. 1974; R.C.M. 1947, 89-3506(4).

### **Cross-References**

Recreational use of flood control channel prohibited, 23-2-301, 23-2-302.

**76-5-404. Artificial obstructions and nonconforming uses.** (1) An artificial obstruction or nonconforming use in a designated flood plain or designated floodway enforced under 76-5-301(1) and (2) and not exempt under 76-5-401 through 76-5-403 or subsection (2) or (3) of this section is a public nuisance unless a permit has been obtained for the artificial obstruction or nonconforming use from the department or the responsible political subdivision.

- (2) It is unlawful for a person to establish an artificial obstruction or

nonconforming use within a designated flood plain or a designated floodway without a permit from the department or the responsible political subdivision.

(3) (a) Parts 1 through 4 of this chapter do not affect any existing artificial obstruction or nonconforming use established in the designated flood plain or designated floodway before the land use regulations adopted by the political subdivision are effective or before the department has enforced a designated flood plain or a designated floodway under 76-5-301(1) and (2).

(b) However, a person may not make nor may an owner allow alterations of an artificial obstruction or nonconforming use within a designated flood plain or a designated floodway whether the obstruction proposed for alteration was located in the flood plain or floodway before or after July 1, 1971, except upon express written approval of the department or the responsible political subdivision. Maintenance of an obstruction is not an alteration.

**History:** En. Secs. 5, 6, Ch. 393, L. 1971; amd. Secs. 3, 4, Ch. 294, L. 1973; amd. Secs. 197, 198, Ch. 253, L. 1974; amd. Secs. 4, 5, Ch. 271, L. 1974; R.C.M. 1947, 89-3505, 89-3506(1); amd. Sec. 256, Ch. 418, L. 1995.

**76-5-405. Variance for obstruction or nonconforming use.** (1) The department or the responsible political subdivision may issue permits for the establishment or alteration of artificial obstructions and nonconforming uses that would otherwise violate 76-5-401 through 76-5-404. The application for the permit must be submitted to the department or the responsible political subdivision and contain the information that the department requires, including complete maps, plans, profiles, and specifications of the obstruction or use and watercourse or drainway.

(2) Permits for obstructions or uses to be established in the designated flood plain or designated floodway of watercourses must be specifically approved or denied within a reasonable time by the department or the responsible political subdivision. Permits for obstructions or uses in the designated flood plains or designated floodways are conclusively considered to have been granted 60 days after the receipt of the application by the department or the responsible political subdivision or after a time that the department or the responsible political subdivision specifies, unless the department or the responsible political subdivision notifies the applicant that the permit is denied. The responsible political subdivision shall send to the department a copy of each permit granted pursuant to 76-5-406 and this section.

(3) An application for a permit must be accompanied by a nonrefundable application fee of \$10, which the state treasurer shall credit to the floodway obstruction removal fund.

(4) The department or the responsible political subdivision may make a part of the permit any reasonable conditions that it may consider advisable. In order for the permit to continue to remain in force, the obstruction or use must be maintained so as to comply with the conditions and specifications of the permit.

**History:** En. Sec. 7, Ch. 393, L. 1971; amd. Sec. 199, Ch. 253, L. 1974; amd. Sec. 6, Ch. 271, L. 1974; R.C.M. 1947, 89-3507(part); amd. Sec. 257, Ch. 418, L. 1995.

**76-5-406. Criteria to be considered in connection with variance request.** In

passing upon the application, the department or the responsible political subdivision shall consider in accordance with the minimum standards established by the department:

- (1) the danger to life and property by water that may be backed up or diverted by the obstruction or use;
- (2) the danger that the obstruction or use will be swept downstream to the injury of others;
- (3) the availability of alternate locations;
- (4) the construction or alteration of the obstruction or use in such a manner as to lessen the danger;
- (5) the permanence of the obstruction or use;
- (6) the anticipated development in the foreseeable future of the area that may be affected by the obstruction or use; and
- (7) other factors in harmony with the purpose of parts 1 through 4 of this chapter.

**History:** En. Sec. 7, Ch. 393, L. 1971; amd. Sec. 199, Ch. 253, L. 1974; amd. Sec. 6, Ch. 271, L. 1974; R.C.M. 1947, 89-3507(part); amd. Sec. 258, Ch. 418, L. 1995.

## **Parts 5 through 10 reserved**

### **Part 11**

#### **Water Conservation and Flood Control Projects**

##### **Part Cross-References**

Flood Control Act of 1954 -- distribution of revenue to counties, 17-3-231, 17-3-232.

Eminent domain for flooding from construction of dam, 70-30-104.

Flood control function of conservancy districts, 85-9-102.

**76-5-1101. Water conservation and flood control projects authorized.** (1) Cities, towns, or counties, through their councils, boards of county commissioners, or other governing body, are hereby empowered, either individually or jointly, to engage or participate in the establishment of water conservation and flood control projects within the limits of such city, town, or county:

(a) for the protection or reclamation of property situated therein from floods or high waters and to protect property therein from the effects of floodwater; and

(b) for the conservation, development, storage, distribution, drainage, and utilization of water for purposes beneficial to the district.

(2) Purposes beneficial to the district include but are not limited to industrial and municipal water supply, recreation and wildlife, irrigation, streamflow stabilization, household and domestic use, and pollution abatement whenever the establishment of such a water conservation and flood control system shall, in the judgment of the city council, board of county commissioners, or other governing body, be conducive to public convenience and welfare.

**History:** En. Sec. 1, Ch. 272, L. 1965; amd. Sec. 1, Ch. 284, L. 1967; R.C.M. 1947, 89-3301(part).

**76-5-1102. Types of projects.** Such cities, towns, or counties in accordance with the provisions of this part, individually, jointly, or severally or in cooperation with the federal or state government or any department or agency thereof and with each other, may deepen, widen, straighten, alter, change, divert, or otherwise improve the watercourses within or without their limits by constructing levees, dikes, embankments, structures, impounding reservoirs, or conduits and improve, widen, and establish streets, alleys, and boulevards across and adjacent to the abandoned or new channel or conduit and provide for the payment of the cost and maintenance of such project or projects under the terms of this part.

**History:** En. Sec. 1, Ch. 272, L. 1965; amd. Sec. 1, Ch. 284, L. 1967; R.C.M. 1947, 89-3301(part).

**76-5-1103. Water conservation and flood control activities declared public purpose.** Such water conservation and flood control activities and their establishment, construction, operation, and maintenance as authorized by this part are declared to be for the protection of the tax base of the city, town, or county; for the protection of public roads, lands, and improvements; for the protection of the public health, sanitation, and safety; and for improvement of the general welfare.

**History:** En. Sec. 2, Ch. 272, L. 1965; amd. Sec. 2, Ch. 284, L. 1967; R.C.M. 1947, 89-3302.

**76-5-1104. Construction of part.** (1) This part and each section thereof shall be construed as granting additional power without limiting the power already existing in cities, towns, and counties.

(2) The provisions of this part and the methods of organization of water conservation and flood control projects are hereby declared to be an alternative method to any other method proposed by any law now in existence or hereafter enacted for the creation of such projects, and it is hereby declared that no provision hereof shall be amended or repealed by implication or otherwise as being in conflict with any existing law or future enactment unless specifically so declared by the legislature.

**History:** (1)En. Sec. 13, Ch. 272, L. 1965; Sec. 89-3313, R.C.M. 1947; (2)En. Sec. 12, Ch. 284, L. 1967; Sec. 89-3314, R.C.M. 1947; R.C.M. 1947, 89-3313, 89-3314.

**76-5-1105. Division of work into parts.** Whenever any city, town, or county has begun a water conservation or flood control system, or both, under this part, the council, board, or other governing body shall have the power to divide the work into parts, sections, or districts; to omit parts of said work; and to contract for any part or section separately and proceed therewith the same as if the entire work or improvements were contracted for, done, or made.

**History:** En. Sec. 11, Ch. 272, L. 1965; amd. Sec. 11, Ch. 284, L. 1967; R.C.M. 1947, 89-3311.

**76-5-1106. Requirements to change project boundaries.** The boundaries of a project once established shall not be extended without the vote of a majority of the electors residing in the area proposed to be annexed. Such electors are to be determined, and such election is to be held in accordance with the provisions of 76-5-

1117.

History: En. Sec. 1, Ch. 272, L. 1965; amd. Sec. 1, Ch. 284, L. 1967; R.C.M. 1947, 89-3301(part).

**76-5-1107. Direction and construction responsibility of state or federal government -- local role.** This part contemplates that the actual direction of the project and the doing of the work in connection therewith is assumed by either the state or the federal government and the city, town, or county provides and assumes the cost of necessary right-of-way over and above such contributions in that regard as the federal government may choose to make. Under such limitation, all appropriate portions of this part shall apply.

History: En. Sec. 6, Ch. 272, L. 1965; amd. Sec. 5, Ch. 284, L. 1967; R.C.M. 1947, 89-3306.

**76-5-1108. Acquisition of property.** (1) Cities, towns, and counties may acquire by gift, purchase, or condemnation pursuant to Title 70, chapter 30, private property within the limits of the project that may be necessary to carry into effect the provisions of this part and to provide an outlet for the watercourses, either natural or artificial. Watercourses may be deepened, widened, straightened, altered, changed, diverted, or otherwise improved under the provisions of this part. Property rights that may be acquired include the right to cross railroad right-of-way and property and highway right-of-way and property so as not to impair the previous public use.

(2) All applicable provisions of Title 70, chapter 30, apply to the condemnation of property under this section.

History: En. Sec. 3, Ch. 272, L. 1965; amd. Sec. 3, Ch. 284, L. 1967; R.C.M. 1947, 89-3303; amd. Sec. 92, Ch. 125, L. 2001.

### **Cross-References**

Eminent domain, Art. II, sec. 29, Mont. Const.; Title 70, ch. 30.

**76-5-1109. Contracts for use of railroads and highways.** A city, town, or county may contract with a railroad company or with the department of transportation for the use of railroad or highway rights-of-way and embankments and other railroad or highway property which can be utilized by the city, town, or county for the purpose of water conservation or flood control or protection as part of its water conservation or flood control system, or both, for a period not exceeding 99 years.

History: En. Sec. 10, Ch. 272, L. 1965; amd. Sec. 10, Ch. 284, L. 1967; amd. Sec. 207, Ch. 316, L. 1974; R.C.M. 1947, 89-3310; amd. Sec. 3, Ch. 512, L. 1991.

**76-5-1110. Cooperation with governmental, public, and private agencies.** (1) Cities, towns, and counties may in accordance with the provisions of this part:

- (a) accept funds and property or other assistance, financial or otherwise, from federal, state, and other public or private sources for the purpose of aiding the construction and maintenance of water conservation and flood control projects; and
- (b) cooperate and contract with the state or federal government or any department or agency thereof in furnishing assurances and meeting local cooperation requirements of any project involving control, conservation, and use of water.

(2) Cities, towns, and counties may also enter into agreement with the federal government to maintain levees, dikes, or other construction and to do all other acts required by the federal government in maintaining the work when completed.

**History:** En. Secs. 4, 7, Ch. 272, L. 1965; amd. Secs. 4, 6, Ch. 284, L. 1967; R.C.M. 1947, 89-3304, 89-3307(part).

**76-5-1111. Apportionment of costs.** (1) The cost of all right-of-way acquired by purchase or condemnation pursuant to Title 70, chapter 30, together with any other property rights that may be required in furtherance of projects under this part, may be borne by the city, town, or county.

(2) The work of actual construction and the cost of construction may be borne by the federal government.

**History:** En. Sec. 5, Ch. 272, L. 1965; R.C.M. 1947, 89-3305; amd. Sec. 93, Ch. 125, L. 2001.

**76-5-1112. Sources of funds for cost of acquiring right-of-way and other costs.** (1) The council, board, or governing body shall have power to allocate a portion of the street or road fund, as the case may be, for the purpose of acquiring right-of-way or the operation and maintenance of completed projects.

(2) Cities, towns, and counties in furtherance of such water conservation and flood control projects may accept contributions to enable them to pay for necessary right-of-way.

(3) The council, board of county commissioners, or other governing body shall also have the authority to receive and accept appropriations and contributions from any source of either money or property or other things of value to be held, used, and applied for the purposes provided in this part.

**History:** (1)En. Sec. 8, Ch. 272, L. 1965; amd. Sec. 7, Ch. 284, L. 1967; Sec. 89-3308, R.C.M. 1947; (2)En. Sec. 7, Ch. 272, L. 1965; amd. Sec. 6, Ch. 284, L. 1967; Sec. 89-3307, R.C.M. 1947; (3)En. Sec. 9, Ch. 284, L. 1967; Sec. 89-3309.1, R.C.M. 1947; R.C.M. 1947, 89-3307(part), 89-3308, 89-3309.1(part).

**76-5-1113. Special assessments for operation and maintenance authorized.** (1) Any city, town, or county that shall establish a water conservation or flood control system, or both, pursuant to this part may for the purpose of providing funds for the operation and maintenance thereof levy an annual special assessment against all real property in the area benefiting from such system.

(2) Such special assessments for the operation and maintenance of any system authorized by this part shall be levied as are other special improvement levies as required by law.

**History:** En. Sec. 9, Ch. 272, L. 1965; amd. Sec. 8, Ch. 284, L. 1967; R.C.M. 1947, 89-3309(part).

## **Cross-References**

Special improvement district assessments, Title 7, ch. 12, part 41.

**76-5-1114. Determination of assessment.** (1) The special assessment shall



be:

(a) levied against each lot or parcel of land in the benefited area for that portion of the money required which its area bears to the total area of all of the lands to be assessed; or

(b) at the option of the governing body of the city, town, or county, as the case may be, based upon the taxable valuation, as stated in the last-completed county assessment roll, of the lots or parcels of land, exclusive of improvements thereon, within said benefited area; in which case each lot or parcel of land to be assessed shall be assessed with that part of the amount of money required which its taxable valuation bears to the total taxable valuation of all of the lands to be assessed.

(2) However, where the benefited area lies in more than one county or lies both within a county and also a city or town, the same method of assessment shall be used for each governing body.

**History:** En. Sec. 9, Ch. 272, L. 1965; amd. Sec. 8, Ch. 284, L. 1967; R.C.M. 1947, 89-3309(part).

**76-5-1115. Fees and charges authorized.** Cities, towns, and counties may for the purpose of providing funds for the operation and maintenance of completed projects fix, maintain, and collect fees, rents, tolls, and other charges for services rendered or facilities provided.

**History:** En. Sec. 9, Ch. 284, L. 1967; R.C.M. 1947, 89-3309.1(part).

**76-5-1116. Determination of fees and charges.** (1) In fixing the rate, fee, toll, or rent for water furnished for household use, domestic use, irrigation use, industrial use, and municipal use and for water used for streamflow stabilization, the governing body shall charge a fee sufficient to pay the proportionate share of the repairs, maintenance, and operating expenses as the use bears in economic value to the total economic value of the total use of the facilities of the project or projects. The economic value is to be determined by the governing body.

(2) For the benefits received by areas within the boundaries of the project or projects for flood prevention, flood control, and pollution abatement, the governing body shall determine a reasonable valuation or charge. The valuation or charge must be certified by the governing body to the county commissioners prior to the time general taxes are levied and assessed. Subject to 15-10-420, the county commissioners shall levy a special assessment as provided for in 76-5-1113 and 76-5-1114 against the area or areas sufficient to provide revenue for the repairs, maintenance, and operating expenses of the project.

(3) For recreation use the governing body shall first determine the share of the costs of operation, repairs, and depreciation to be charged against recreation uses and from this figure shall subtract the estimated amount of fees and tolls collected for recreation uses. The deficiency, if any, must be certified to the county commissioners, and subject to 15-10-420, special assessments must be levied by the county commissioners in the manner provided in this section.

**History:** En. Sec. 9, Ch. 284, L. 1967; R.C.M. 1947, 89-3309.1(part); amd. Sec. 144, Ch. 584, L. 1999.

**76-5-1117. Bonds authorized -- procedure.** Cities, towns, and counties are authorized to contract indebtedness and to issue special improvement district or rural improvement district bonds to provide funds for the payment of the cost of improvements contemplated by this part by following the procedures established for the issuance of such bonds under the provisions of Title 7, chapter 12, part 42, as to cities and towns and Title 7, chapter 12, part 21, as to counties. Payment and security for the bonds shall be provided by following the following procedures:

(1) Tax assessments for the payment of the bonds shall be levied in accordance with Title 7, chapter 12, parts 41 and 42, or Title 7, chapter 12, part 21, as to cities and counties, respectively, or 76-5-1114(1).

(2) A revolving fund, to be pledged for the security of the bonds, must be established pursuant to the provisions of Title 7, chapter 12, part 42, as to cities and towns, and Title 7, chapter 12, part 21, as to counties, by the governing body authorizing the issuance of the bonds.

**History:** En. Sec. 12, Ch. 272, L. 1965; amd. Sec. 1, Ch. 239, L. 1971; R.C.M. 1947, 89-3312; amd. Sec. 15, Ch. 266, L. 1979; amd. Sec. 1, Ch. 209, L. 1981.